

Message Text

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ORIGIN L-03

INFO OCT-01 AF-10 EUR-25 EA-11 ISO-00 EB-11 CIAE-00

DODE-00 PM-07 H-03 INR-10 NSAE-00 NSC-10 PA-03 RSC-01

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TO AMEMBASSY TOKYO

INFO AMEMBASSY BONN

AMEMBASSY BRUSSELS

AMEMBASSY THE HAGUE

AMEMBASSY PARIS

AMEMBASSY ROME

AMEMBASSY TRIPOLI

USMISSION EC BRUSSELS

USMISSION OECD PARIS

C O N F I D E N T I A L STATE 176737

E.O. 11652: GDS

TAGS: ENRG, LY, JA

SUBJ: LIBYAN PARTICIPATION TALKS

REF: TOKYO 10880

1. IN RESPONSE TO MITI'S QUESTION STATED PARA 2 REFTEL,
INFORM BOTH MITI AND FONOFF LEGAL SECTION THAT BP AND
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BUNKER HUNT HAVE JOINED IN SUITS IN SEVERAL COUNTRIES

SEEKING TO ATTACH OIL EXTRACTED FROM FIELDS FOR WHICH THEY CLAIM TO HAVE CONTINUING EXCLUSIVE CONCESSIONARY RIGHTS. USG AGREES TAKING WAS IN VIOLATION OF INTERNATIONAL LAW BECAUSE DISCRIMINATORY AND NOT FOR A PUBLIC PURPOSE, AND SUPPORTS COMPANIES ACTIONS TO ASSERT THEIR LEGAL RIGHTS IN COURTS. THESE SUITS, WHICH RESEMBLE THOSE THAT KENNECOTT IS PURSUING AGAINST COPPER EXPORTED FROM CHILE, ASSERT THAT EXPROPRIATION IN VIOLATION OF INTERNATIONAL LAW IS INEFFECTIVE TO PASS TITLE TO LARG OR PURCHASERS THEREFROM. FYI: EXTENT TO WHICH COURTS WILL ADDRESS VALIDITY OF TAKING UNDER INTERNATIONAL LAW, OR THE ISSUE OF TITLE TO OIL FROM CONCESSION REMAINS UNCLEAR. IN ROSEMARY CASE, ADEN COURT DECIDED IN FAVOR OF BP CONTENTIONS AGAINST MOSSADEGH'S EXPORT OF OIL FROM IRANIS THEN SEIZED FIELDS. HOWEVER, SIMILAR SUITS BY BP THEN FAILED WHEN BROUGHT IN ITALY AND JAPAN. END FYI.

2. WITH RESPECT TO UN VIEW ON OWNERSHIP OF RESOURCES, WE ASSUME MITI REFERS TO UNGA RES. 1803 (XVII) ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES. WHILE THAT RES. AFFIRMS THAT STATES HAVE SOVEREIGNTY OVER THEIR NATURAL WEALTH AND RESOURCES, IT ALSO PROVIDES THAT FOREIGN INVESTMENTS "SHALL BE GOVERNED BY THE TERMS THEREOF, BY THE NATIONAL LEGISLATION IN FORCE, A BY INTERNATIONAL LAW." IT PROVIDES THAT "FOREIGN INVESTMENT AGREEMENTS FREELY ENTERED INTO BY OR BETWEEN SOVEREIGN STATES SHALL BE OBSERVED IN GOOD FAITH." IN CASE OF EXPROPRIATION, "THE OWNER SHALL BE PAID APPROPRIATE COMPENSATION, IN ACCORDANCE WITH THE RULES IN FORCE IN THE STATE TAKING SUCH MEASURES IN THE EXERCISE OF ITS SOVEREIGNTY A IN ACCORDANCE WITH INTERNATIONAL LAW." IN VIEW OF USG, APPROPRIATE COMPENSATION EQUATES WITH PROMPT, ADEQUATE, AND EFFECTIVE COMPENSATION, A VIEW EXPRESSED BY USDEL IN EXPLAINING ITS VOTE ON RES. 1803. THAT RES. FURTHER PROVIDES THAT "IN ANY CASE WHERE THE QUESTION OF COMPENSATION GIVES RISE TO A CONTROVERSY, THE NATIONAL JURISDICTION OF THE STATE TAKING SU(H) MEASURES SHALL BE EXHAUSTED. HOWEVER, CONFIDENTIAL

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UPON AGREEMENT BY SOVEREIGN STATES AND OTHER PARTIES CONCERN, SETTLEMENT OF THE DISPUTE SHOULD BE MADE THROUGH ARBITRATION OR INTERNATIONAL ADJUDICATION." COMMENT: IN OUR VIEW, THESE PROVISIONS DO NOT PREJUDICE PRODUCTS IN COURTS OF THIRD COUNTRIES. LARG OFFICIALS HAVE REPEATEDLY EMPHASIZED NO COMPENSATION IN EXCESS OF NET BOOK VALUE WILL BE CONSIDERED. COMMISSION TO FINALIZE DETERMINATION HAS NOT YET MET. USG DOES NOT

CONSIDER SUCH ARRANGEMENT PROMPT OR ADEQUATE, AS REQUIRED BY INTERNATIONAL LAW. LIBYAN OIL CONCESSIONS, INCLUDING THOSE EXPROPRIATED, PROVIDE FOR COMPULSORY ARBITRATION OF DISPUTES. ALTHOUGH LIBYA HAD NAMED ARBITRATOR TO DISCUSS CERTAIN OPERATIONAL DISPUTES WITH BUNKER HUNT, ARBITRATORS NEVER MET AND LIBYA TERMINATED DESIGNATION FOLLOWING ITS NATIONALIZATION ON JUNE 11. LIBYA HAS ALTOGETHER REFUSED TO NAME ARBITRATOR IN THE DISPUTE WITH BP, WHICH HAS THEREFORE REFERRED ISSUES TO SOLE ARBITRATOR NAMED BY ICJ PRESIDENT IN ACCORDANCE WITH CONCESSION AGREEMENT. INTERNATIONAL LEGAL AUTHORITIES AGREE THAT REFUSAL BY A GOVERNMENT TO SUBMIT TO ARBITRATION IN ACCORDANCE WITH CONTRACTUAL AGREEMENT CONSTITUTES A DENIAL OF JUSTICE IN VIOLATION OF INTERNATIONAL LAW. THIS IS VIEW OF USG, AND THAT VIEW HAS BEEN VIGOROUSLY ESPOUSED BY FRANCE

AND UK IN PROCEEDINGS BEFORE ICJ, IN CASES, HOWEVER, IN WHICH ICJ DID NOT RENDER RULING ON QUESTION. SUCH ARBITRATION PROVISIONS HAVE BEEN INTERPRETED TO BE WAIVER OF LOCAL JURISDICTION. THE ACTIONS OF LIBYA CONSTITUTE AN ANTICIPATORY REPUDIATION OF ITS OBLIGATIONS TO SUBMIT TO ARBITRATION THE MATTERS RELATING TO THE EXPROPRIATION OF BUNKER HUNT AND COMPENSATION THEREFOR. IN THESE CIRCUMSTANCES, AND IN VIEW OF USG CONCLUSION THAT THIS EXPROPRIATION IS INVALID AS DISCRIMINATORY, LACKING PUBLIC PURPOSE AND FAILING TO PROVIDE ADEQUATE COMPENSATION, THE USG SUPPORTS BUNKER HUNT'S ATTEMPT TO ATTACH OIL FROM ITS CONCESSION VIA ACTIONS IN COURTS OF THIRD COUNTRIES. END COMMENT. RUSH

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